BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

BNSF RAILWAY CO., Petitioner, v. SNOHOMISH COUNTY, Respondent.	DOCKET TR-090121

POST-HEARING BRIEF ON BEHALF OF COMMISSION STAFF

May 8, 2009

JONATHAN C. THOMPSON
Assistant Attorney General
Office of the Attorney General
PO Box 40128
1400 S Evergreen Park Drive SW
Olympia, WA 98504-0128
(360) 664-1225

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Court Cases

Agency Cases

Statutes and Rules

I. INTRODUCTION

1 Commission Staff submits the following post-hearing brief in support of BNSF Railway Company's Petition to close the Logen Road at-grade crossing in Snohomish County pursuant to RCW 81.53.060.

2 All of the expert testimony demonstrates that the crossing will become exceptionally hazardous—as well as less useful to motorists—as a result of railroad operations on the siding track that is to be constructed next to the existing mainline track at Logen Road. The County, Commission staff and BNSF witnesses agree that the hazard of keeping Logen Road crossing open outweigh the public convenience and need served by the crossing.

3 The intervenor, Lynn Logen, fails to present compelling evidence of a public need to keep the crossing open or of the feasibility, either from a technical or financial standpoint, of installing costly warning devices to reduce the new hazards associated with railroad operations on the siding track.

II. LEGAL STANDARD AND LIMITATIONS ON THE COMMISSION'S AUTHORITY

A. Legal Standard.

4 Under RCW 81.53, the Commission is authorized to determine whether a county road, city street, or state highway may be permitted to cross a railroad on a common grade, instead of by over- or under-pass.[1] The Commission is also authorized to hear petitions from road authorities or railroads for "the closing and discontinuance of an existing

[1] RCW 81.53.020, 030.

highway[2] crossing, and the diversion of travel thereon to another highway or crossing."[3] The Commission may grant such a petition when the Commission finds that doing so is required by "the public safety."[4]

5 It is well established in Washington law that at-grade crossings are inherently dangerous and that, when practicable, public roads should pass either above or below the grade of the railroad.[5] As the court in *Snohomish County* explained, "[t]he statute law of this state relating to grade crossings has for many years been based upon the theory that all grade crossings are dangerous, and administrative commissions have existed with extensive powers of regulation."[6]

6 BNSF filed a petition in accordance with RCW 81.53.060, requesting an order requesting closure of the Logen Road crossing. The relevant portion of RCW 81.53.060 states that:

> any railroad company whose road is crossed by any highway, may file with the commission . . . its petition in writing, alleging that the public safety requires . . . the closing or discontinuance of an existing highway crossing, and the diversion of travel thereon to another highway or crossing . . . .

In the case of *Department of Transportation v. Snohomish County*,[7] the court concluded that the Commission's authority under this provision extended to considering "the convenience and necessity of those using the crossing and whether the need of the crossing is so great

---

[2] "Highway" is defined in RCW 81.53.010 to include "all state and county roads, streets, alleys, avenues, boulevards, parkways and other public places actually open and in use, or to be opened and used, for travel by the public."
[3] RCW 81.53.060.
[4] *Id.*
[5] RCW 81.53.020.
[6] *Id.* at 251.
[7] *Dep't of Transportation v. Snohomish County*, 35 Wn.2d 247 (1949) ("*Snohomish County*").

that it must be kept open notwithstanding its dangerous condition."[8] The Commission has continued to follow this same balancing test.[9]

7 Factors considered by the Commission in deciding requests to close grade crossings have included: 1) the amount and character of travel on the railroad and on the highway; 2) the number of people affected by the closure; 3) whether there are readily available alternate crossings in close proximity that can handle any additional traffic that would result from the closure; and 4) the safety of the alternative crossings.[10]

B. The Commission's crossing blocking rule cannot be enforced in a manner that would prevent the use of the siding for its intended purpose.

8 The Commission has adopted a rule, WAC 480-62-220, which prohibits railroad companies from blocking a grade crossing "for more than ten consecutive minutes, if reasonably possible." The rule also provides that, if it can do so in a manner consistent with federal regulations, the railroad must clear a blocked grade crossing when the engineer becomes aware that the crossing is being approached by a law enforcement or other emergency services vehicle with its emergency lights flashing.

9 The application of the Commission's blocking rule is limited by its own terms. First, it applies only to a stopped train,[11] and not, for example, to a lengthy train moving slowly past a crossing. Second, the Commission's blocking rule only prohibits blocking a crossing with a standing train for more than 10 minutes "if reasonably possible."

---

[8] *Snohomish County*, 35 Wn.2d at 254.
[9] *See BNSF Railway Company v. City of Mount Vernon*, TR-070696 (Nov. 4, 2008); *Burlington Northern Santa Fe v. City of Ferndale*, TR-940330 (March 31, 1995); *Burlington Northern Railroad Co. v. Skagit County*, TR-940282 (Dec. 13, 1996); *Union Pacific Railroad v. Spokane County*, TR-950177 (July 3, 1996).
[10] *Id.*
[11] WAC 480-62-220(3): "A grade crossing is 'blocked' if any part of a *stopped* train occupies the crossing. . . ." [Emphasis added.]

10 The application of the blocking rule is also limited by federal preemption. In *City of Seattle v. Burlington Northern Railroad Co.*,[12] the Washington Supreme Court invalidated a City of Seattle ordinance that purported to limit to four minutes the amount of time BNSF could block a street with its switching operations, and prohibited switching operations over city streets during certain peak use times during the day. The Court held that the ordinance was invalid under the Interstate Commerce Commission Termination Act, which reserves to the Surface Transportation Board exclusive authority over "switching" operations.[13] The court also held that the ordinance was invalid under the Federal Railroad Safety Act (FRSA), which provides that "[l]aws, regulations, and orders related to railroad safety shall be nationally uniform to the extent practicable."[14] The Court held that by limiting the amount of time the train can occupy the crossing, the ordinance touches on the subjects of train speed, train length, and trains in physical motion, all of which are regulated (from a safety standpoint) by the Federal Railroad Administration.[15] Thus, even with the limitations that exist in the blocking rule itself, the circumstances under which the rule can be enforced are circumscribed to a large extent by federal law.

III. SUMMARY OF FACTS

11 Logen Road crossing sits in the middle of a curved portion of what is currently a single set of mainline BNSF tracks. Tr. 106. Because of the curve and the surrounding topography, the distance that the driver of a motor vehicle on Logan Road can see down the

[12] 145 Wash. 2d 661, 41 P.3d 1169 (2002).
[13] *Id.* at 668-9.
[14] 49 U.S.C. § 20106.
[15] 145 Wash. 2d at 673.

tracks to the north and south is very limited. Tr. 169. Sight distance at the crossing is approximately 400 feet to the south and 800 feet to the north. Tr. 278. Because of the inability to see trains approach on the tracks, railroad crews cannot safely walk along or work on the track without the use of railroad flagmen. Tr. 112.

12 Currently 8 to 10 freight trains per day cross Logen Road, but that number could return to as many as 15 per day, depending on market conditions. In addition, four Amtrak passenger trains cross Logen Road per day. Tr. 97, 98. Speeds are 79 miles per hour for passenger trains and 60 miles per hour for freight. Tr. 98.

13 Because of the limited sight distance and the high speed of trains using the tracks, it is impossible for a motorist stopped at Logen Road to traverse the crossing before a train just out of view would arrive at the crossing. Tr. 278. Thus, the crossing would be unsafe under present conditions without the active warning gates and lights, the circuits for which extend several thousand feet from the crossing. *Id.*

14 Logen Road currently has a very low traffic volume of 142 cars per day, including 11 cars at a.m. peak and 19 at p.m. peak. Tr. 160, 205. Half the traffic is generated by the approximately seven single family homes on Logen Road. Tr. 161, 162.

15 The city of Stanwood is the activity center that is served by Logen Road and surrounding roads. Stanwood lies primarily west of the tracks, south of Logen Road. A motorist starting at the Logen Road crossing can currently drive west a few hundred feet to Old Pacific Highway, turn left and drive about a mile and half to 271st street in the central part of Stanwood. The same motorist can also proceed in the opposite direction, southeast on Logen Road for three quarters of a mile, to Pioneer Highway, turn right and proceed

another three quarters of a mile to 271st Street in the eastern part of Stanwood, and proceed west from there to cross the tracks and reach the central part of Stanwood. Tr. 163, 164.

16 If the Logen Road crossing were closed, most traffic would divert to Pioneer Highway and 271st Street crossing, though a small portion would divert north to Dettling Road. Tr. 163, 164.

17 A new Amtrak station will be built south of Logen Road near 271st Street in Stanwood over the summer with funding from the Washington State Department of Transportation (WSDOT). In order to relieve train traffic congestion impacts to the rail system (from freight trains having to wait for a train stopped at the station), WSDOT has also agreed to fund improvements to BNSF's existing Stanwood siding track, which parallels the mainline tracks starting just south of 271st Street and proceeding north. Tr. 136, 137.

18 Specifically, BNSF plans to extend the length of the existing siding further to the north by building a new mainline along the west side of the existing main, after which the existing main will be converted to a siding. Tr. 130. The purpose of the siding extension project is to enable freight trains up to 8,500 feet in length to park while they are met and passed by other trains using the mainline. Tr. 96. The new siding will result in two sets of tracks crossing Logen Road, Dettling Road (also known as 300th Street), and 102nd Street, where there currently is only the single mainline. The railroad's planned use of the siding track is to park trains in the area south of and including Logen Road crossing. Tr. 113, 114.

19 The siding will also be used in connection with the new Amtrak station in Stanwood. Tr. 100. There will be an "Amtrak pocket" between 102nd and Dettling/300th Street, north of

Logen Road that will provide an Amtrak train a place to sit, for meet and pass purposes, while another Amtrak train is stopped at the station. Tr. 109, 110.

20 Because the intended operation of the siding will result in the frequent blocking of Logen Road with standing and slow moving freight trains, WSDOT supports closure of the Logen Road crossing. Tr. 139.

21 It would defeat the efficiencies that BNSF and WSDOT seek to achieve with the siding to require parked train cars to be separated at the Logen Road crossing during meet and pass operations. Tr. 275-277. Therefore, it is staff's position that the Commission's crossing blocking rule, WAC 480-62-220, would not require train cars to be decoupled and separated at Logen Road under normal meet and pass operations, if the crossing were to remain open.

22 Once constructed, train operations on the siding could cause Logen Road to be blocked for long periods. Tr. 102. Logen Road will be blocked each time a freight train enters the siding to hold. Tr. 111. A train could also block Logen Road for very long periods in the event of a derailment, rail failure, or mechanical problem. Tr. 112.

23 Even shorter "local" trains that could be parked between 271st Street to the south and Logen Road to the north will still need to move very slowly over the Logen Road crossing to enable another train to pass on the mainline. Because of the "meet and pass" purpose of the siding, a motorist who became impatient waiting for the slow moving train to pass and drove around the gates could be struck by the fast moving passing train (including, potentially a passenger train moving at 79 mph) on the mainline. Tr. 139, 140.

24 Passenger train speeds over Logen Road crossing are not likely to diminish following initiation of service at the Stanwood Amtrak station. A commuter train departing Stanwood station in a northerly direction will likely have reached its maximum speed of 79 mph by the time it reaches Logen Road. Tr. 126. The reverse is also true for trains leaving the Amtrak pocket north of Logen or simply approaching the Stanwood station from the north. Passenger trains accelerate and decelerate very quickly—much faster than a freight train. Tr. 140, 141.

25 Dettling Road (also known as 300th), is the closest road over the railroad tracks to the north of Logen Road. On average, it has 800 cars a day. Tr. 162. The intersection of Dettling and Old Pacific Highway is approximately half a mile from the intersection of Logen and Old Pacific. Exh. 7, p. 3.

26 Dettling Road crossing lies in the same long curve in the BNSF tracks as Logen Road. Tr. 129. As noted above, Dettling Road crossing will also have two tracks following construction. Tr. 131. However, Dettling Road is not within the portion of the siding where BNSF will park trains. Tr. 131, 132. A freight train parked within the siding would be at least 950 feet south of Dettling Road and in fact would not be visible from Dettling because of the curve to the south. Tr. 134.

27 The area surrounding Logen and Dettling Road is agricultural and the county has posted signs on Dettling Road to indicate the presence of farm equipment using the road. Tr. 166. It would take a person driving farm equipment at 25 mph an additional 4-5 minutes to drive the corner of Logen and Old Pacific Highway north to Dettling Road, east to

Pioneer Highway and south to Logen Road than it would to proceed directly to the same location via Logen Road and the existing crossing. Tr. 186, 189.

28 Although Dettling Road crossing had two recorded accidents before it was improved with active warning gates and lights, there have been no subsequent accidents. Tr. 167, 168. The county and railroad are making improvements to the approaches to Dettling Road crossing that will further improve safety. The crossing presently has cantilever mounted lights and gates. No accidents have occurred at Dettling since the installation of these devices. Tr. 321, 321.

29 From a capacity standpoint, Dettling Road could easily accommodate any traffic that might be diverted to it as a result of the closure of the Logen Road crossing. Tr. 165.

30 271st Street has 7,800 average daily traffic. Tr. 162. If Logen Road traffic were diverted to it as a result of closing the Logen Road crossing, 271st could easily accommodate the additional traffic and remain within its capacity. Tr. 164, 165.

31 271st has had a history of accidents from pedestrians and vehicles going around the gates and warning system. However, as part of this project, improvements are being made to mitigate these problems. Tr. 167, 168.

32 The stakeholders (railroad, road authority, and staff of the Commission) convened a diagnostic meeting at the 271st Street crossing with the result that the railroad will install all new active warning devices, add additional signage, and reconsider sidewalk placement because of increased pedestrian traffic due to the new station. This alleviated Staff's concerns about the safety of 271st Street as an alternative crossing to which traffic would be diverted from Logen Road crossing, as well as for its own sake. Tr. 321, 322.

33 The City of Stanwood is considering video enforcement against driving around the lowered gates at 271st as a way to improve safety. Tr. 330.

34 Logen Road is owned and maintained by Snohomish County. It is Snohomish County Council's position that closure of the Logen Road crossing "will improve public safety by eliminating a low volume crossing over a high-speed rail line." Exh. 9; Tr. 206, 222. The County's traffic engineer, James Bloodgood, P.E., stated that it is reasonable to deflect Logen Road traffic to two adjacent crossings. Tr. 205. Mr. Bloodgood characterized Logen Road as having very low traffic volume and he confirmed that closure of Logen Road crossing would result in no operational effect on the other crossings. Tr. 205. Mr. Bloodgood also indicated that there would be no significant impact on emergency response time if the crossing were closed. Tr. 205.

35 In addition to improvements to the county road crossings at 200th Street and Dettling/300th Street (271st is also to be improved but is a city street), the county indicates it will construct an appropriate turnaround for vehicles on Logen Road east of the tracks. Tr. 115, 117, 118.

36 Snohomish County and BNSF's Traffic Engineering Consultant both concluded that closure of the Logen Road crossing would not adversely affect emergency vehicle response. Tr. 174 (Norris), Tr. 205 (Bloodgood). The Commission's notice to emergency response agencies and Staff's subsequent investigation did not result in any specific objection to closure of the Logen Road crossing from those agencies. Tr. 322, 323.

37 Primary emergency response to the Logen Road area is from Fire District 14 station on 300th, approximately 5 miles east of Logen Road area, although there is also a mutual aid

agreement with the City of Stanwood/Camano Island Fire Department that has a station about 1.6 miles to south on Old Pacific Highway. Tr. 169.

38 Although there are sharp corners that a fire truck would have to navigate when turning from Pioneer Highway onto Logen Road from the east, even if the crossing were to remain open, emergency response would likely have to come from the east (rather than from Old Pacific Highway on the east via the crossing) due to uncertainty about whether the crossing would be blocked. Tr. 170-172, 173. Given the potential difficulty of this approach, it is likely that Stanwood fire station would become the first responder to Logen Road under the mutual aid agreement. Tr. 172. Response time from Stanwood would be four minutes, versus 12 minutes from the Fire District 14 Station on 300th. Tr. 172, 173.

39 BNSF's Manager of Engineering for its Northwest Division, Dann MacDonald, characterized the Logen Road crossing as exceptionally hazardous if it were to be left open following commencement of operations on the siding. The reason is that the frequent blocking could lead to unacceptable driver behavior—specifically, the temptation to beat the train before it arrives or to drive around the gates as soon as the slow train is clear. Tr. 280.

40 Mr. MacDonald stated that if a driver learns from experience that long trains stop at the crossing for extended periods of time, the driver is more likely to attempt to beat the device (run the gate) and put him or herself in a dangerous position. Tr. 268. In addition, a slow moving train or a shorter train stopped south of the crossing could cause people to mistakenly think that it is only the visible train that is causing the gates and lights to be activated, when in fact there is another train approaching out of view at a high rate of speed

on the mainline. Tr. 269. Mr. MacDonald explained that motorists driving into the side of the train at an occupied crossing also occurs with some regularity. Tr. 303.

41 Intervenor Lynn Logen asserts that the crossing could be made safe, even after the construction of the siding track, by the installation of various safety improvements, including four quadrant gates and or/median barriers. Most of his testimony concerned four quadrant gates and not median barriers in isolation. Tr. 361-364.

42 Four quadrant gates cost from $350,000 to $400,000 to install and are typically used in "quiet zone" settings (where railroads are prohibited from sounding train horns to warn of their approach to a crossing) or in high speed rail corridors, but not where there is a siding track and the crossing could be blocked for long periods. In response to the question of whether a four-quadrant gate system could be used at Logen Road in order to leave the crossing open, Mr. MacDonald stated:

> [A]ctive devices are not used at locations where trains routinely block for extended periods of time, because driver expectation is then counter to what the train operations will do, and it creates an issue where you're setting the driver up to see the gates go down, the lights go on, but the train doesn't move for an extended period of time, and that doesn't create a uniform application of the device. Tr. 286.

43 Mr. MacDonald, who is also an associate member of the National Committee on Uniform Traffic Control Devices, stated that this problem would not be adequately addressed by signage telling motorists how long the crossing might be blocked. Tr. 287. Four quadrant gates also would not address the temptation to try to beat the train as it approaches, Tr. 301, or the not uncommon scenario of motorists driving into the side of the train. Tr. 303.

44 Typically the road authority pays for the devices to be installed as a means of obtaining a quiet zone. Tr. 324, 325. In addition to the high cost of installing four quadrant gates, maintenance costs are higher on a four-quadrant gate system than on a two-quadrant gate system. Tr. 325. Mr. MacDonald expressed concerns that Logen Road is likely too narrow to accommodate four quadrant gates. Tr. 272, 273. Because of the narrowness of the lanes, a four quadrant gate could trap a motorist on the crossing surface between the entrance and exit gates. Tr. 288. Median barriers are recommended in combination with four quadrant gates to prevent motorists from attempting to drive around gates as they lower (because the entrance gates lower before the exit gates that are in the oncoming lane from the motorist's perspective). Tr. 292.

45 Intervenor Lynn Logen resides in Bellevue, but members of his family own parcels of property along Logen Road. Tr. 372-375. Either he or his family members currently drive a tractor from one end of Logen Road to the other for use on different parcels. Mr. Logen asserts that if the Logen Road crossing is closed, his family will be forced to drive their tractor around a more circuitous route and this will create a safety hazard on the roads and an inconvenience for motorists on those roads. Tr. 354-358. Mr. Logen admits that the remedy he wants is a private crossing for the use of his family. Tr. 367, 368.

46 Mr. Logen concedes that no one else uses the Logen Road crossing to traverse the tracks from property they own on one side of the crossing to property they own on the other. Tr. 368. Mr. Logen also concedes that he has seen farm equipment driving on Old Pacific Highway and he has driven around it. He's not aware of any accidents on Old Pacific Highway involving farm equipment. Tr. 378, 379.

47 Mr. Logen has not spoken to the County about the cost of installing any of the safety improvements he suggests at the crossings or the viability of installing them on a road as narrow as Logen Road. Tr. 379, 380.

48 Mr. Logen's attempt to use the Federal Railroad Administration's Internet-based hazard calculator for quiet zones to show that the crossing has a low "risk index" was flawed by his misunderstanding of what the program takes into account (e.g., the ability to add a siding track with frequent blocking) and the fact that it is not intended to substitute for the judgment of professionals who actually visit the location and familiarize themselves with various considerations such as sight distance and train operations at the site. Tr. 335-338. The model results were properly excluded by Judge Torem as not having enough foundation or explanation. Tr. 386. Mr. Logen assumed that sight distances were included in the model. Tr. 382. Mr. Logen used a traffic count that appears to have been less than half what the actual recent traffic counts show. Tr. 378.

49 The information about four quadrant gates that Mr. Logen gleaned from the Internet was also properly excluded as not helpful when compared with the expert testimony of live witnesses and the USDOT Grade Crossing Protective Handbook. Tr. 385, 386.

IV. ARGUMENT

50 In this case, the railroad, the road authority, and the Commission's staff agree that closing Logen Road at-grade crossing will improve public safety at little inconvenience to the public.

51 Logen Road is a narrow, very low volume road that serves only a minor role in the county road network north of Stanwood. The siding track that is to be constructed parallel

to the existing tracks for trains to meet and pass will increase the risk of collision between motorists using Logen Road and will thus endanger not only the motorists, but also railroad crews, and Amtrak passengers. In addition, railroad operations on the siding will cause the crossing to be blocked frequently by standing trains, thus diminishing the current utility of the road. If Logen Road crossing is closed, motorists currently using Logen as a through street will be able to use alternative crossings at 271st Street in Stanwood and Dettling/300th Street at little inconvenience. There will be no significant impact on emergency response time to the residences on Logen Road.

52 Lynn Logen, a citizen whose family members own property in the vicinity of the crossing, objected to the closure and intervened to present evidence in opposition to BNSF's petition. Mr. Logen asserts a need to use the crossing for driving a tractor between parcels owned by family members on different ends of Logen Road. This asserted need, however, is a unique private need and does not represent a typical use of the crossing by the general public. The decision to close a crossing is based on a balancing of the *public's* need for the crossing versus considerations of safety to the general public travelling the road in cars, railroad employees, and passengers on Amtrak.[16] Tr. 324.

[16] The Commission's authority extends only to crossings that are open and in use by the public. RCW 81.53.010 (defining "highway" as "state and county roads, streets, alleys, avenues, boulevards, parkways and other *public places* actually open and in use, or to be opened and used, for travel *by the public*"). Thus, private crossings are not within the Commission's regulatory purview. In some circumstances, a railroad might grant a private crossings over railroad right of way to prevent landlocking of parcels, but this Commission would lack jurisdiction to hear a request for such an easement by necessity (and in any event, there clearly is no assertion of parcels being landlocked in this case).

53 There are reasonable alternatives to the Logen family driving their tractor on Old Pacific and Pioneer highways, such as loading the tractor onto a trailer and transporting it on the roadways in that manner. Tr. 326, 331-332.

54 All of the expert testimony shows that the crossing would become exceptionally dangerous after construction of the siding track. The public convenience and necessity does not require the crossing to remain open despite its dangers. The alternative routes are reasonable in terms of distance and time and offer safe means of crossing the railroad. Tr. 327.

V. CONCLUSION

55 For the foregoing reasons, the Commission should grant BNSF's petition to close Logen Road at-grade crossing.

DATED this 8th day of May, 2009.

ROBERT M. MCKENNA
Attorney General

_____

JONATHAN C. THOMPSON
Assistant Attorney General
Counsel for Washington Utilities and
Transportation Commission Staff